(8)

No. 90-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF THE CASE

I. PRELIMINARY

Several documents which are not technically part of the record, and therefore not in the Joint Appendix, may be relevant to the disposition of this appeal. Respondents therefore have lodged with the Clerk's Office the following:

1. Respondents' Brief filed in the District Court in opposition to Petitioner's Motion for Summary Judgment.

2. Arbitration Award of December 29, 1989 (Respondent Danowitz).

3. Arbitration Award of December 15, 1989 (Respondent Weikel).

4. Arbitration Award of March 8, 1990 (Respondents DiCosimo and Jurik).

5. Affirmance of Arbitration Awards by Commonwealth Court of Pennsylvania, Opinion and Orders of November 7, 1990.

In addition, the Joint Appendix does not include documents previously included in the Appendices to the Petition for Writ of Certiorari and Answer. Respondents will cite these documents as "PA" (Petition Appendix) and "AA" (Answer Appendix).

II. COUNTERSTATEMENT

Petitioner's Statement of the Case refers to numerous materials which were not considered by either the Court of Appeals or the District Court. Specifically, petitioner's recitation of the underlying facts is taken from her self-serving Declaration and the exhibits to that Declaration. (JA 64-168).

Petitioner did not file a Motion to Dismiss either the Melo or Gurley Complaints. However, the District Court wished petitioner to file a dispositive pre-trial motion (Respondent's District Court Brief, Pages 1-2) and by Order of July 14, 1989 deferred discovery and directed petitioner to file a Motion for Summary Judgment (JA 1). Respondents objected to a summary judgment proceeding because discovery was not complete and in fact no depositions had yet been taken. (Respondents' District Court Brief, Pages 2-3, PA 11-12).[1] However, respondents' objections were rendered moot by the disposition of the District Court. The District Court decided petitioner's Motion solely upon the facts pleaded in the Complaints without any reference whatsoever to the factual material contained in petitioner's self-serving Declaration. (PA 36-37).

1. The three Arbitration Awards and the exhibits submitted by respondents in their Answer to petitioner's Motion (JA 174-257) indicate what facts respondents might have been able to prove had they been given an opportunity to pursue discovery.

The Court of Appeals treated petitioner's Motion as a Motion to Dismiss and, like the District Court, decided the case based upon the allegations in the Complaints. (PA 10-13).

With respect to the Melo respondents, their Complaints allege the following:

The Melo respondents were employed by the Commonwealth of Pennsylvania in the Office of the Auditor General in low-level positions where party affiliation was neither a necessary nor appropriate requirement for performance of their duties.[2] (JA 8). During the term of petitioner's predecessor, Auditor General Donald Bailey, an investigation was conducted with regard to certain allegations made by John Kerr, a former employee in the Office of the Auditor General and a convicted felon. Kerr had alleged that he had received payments to influence either the employment or promotion of 21 other employees, including the eight Melo respondents. However, Mr. Bailey's investigation disclosed no evidence of wrong-doing by any of the Melo respondents. (JA 8-9)

Bailey, a Democrat, ran for re-election in 1988. His Republican opponent was Hafer. All of the Melo respondents are Democrats. One of Hafer's key campaign issues was that Bailey should have fired the 21 employees identified by Mr. Kerr. Hafer characterized these employees has having "bought their jobs" and made a campaign promise that, if elected, she would fire them. (JA 9-10).

Hafer won the election. Immediately after her inauguration, she fired 18 employees, including the eight Melo respondents, and made public statements throughout the Commonwealth that she was firing people who bought their jobs. Hafer stated publicly that the 18 fired employees paid up to $5,000.00 each for their jobs under a previous administration. (JA 10-11).

Even though Hafer summarily fired the Melo respondents, she did not conduct any investigation into their actual involvement in a job-buying scheme and did not have any more

2. 7 of the 8 Melo plaintiffs were union members whose employment was subject to a collective bargaining agreement. Non-union employees were subject to the Policy and Procedures Manual of the Office of the Auditor General.

information in her possession than Mr. Bailey had when he previously exonerated the Melo respondents. Hafer's motivation in firing the Melo respondents was purely political and in no way based upon respondents' job performance.[3] The Melo respondents were fired without cause, without a hearing, without a reasonable pre-firing investigation and without procedural or substantive due process. (JA 12-13). Such an abusive firing was also a violation of the collective bargaining agreement and the Policy and Procedures Manual of the Office of the Auditor General. (JA 11-13). It was established Commonwealth policy that both union and non-union employees could not be fired without just cause. (JA 191-193).

The allegations of the Gurley plaintiffs are set forth in three separate Complaints, the most complete of which is the Brennan Complaint at JA 37-55. The Gurley plaintiffs allege that they were long-time employees of the Commonwealth of Pennsylvania in the Office of the Auditor General and that they were at low-level positions where party affiliation was neither a necessary nor appropriate requirement for effective performance of their duties.[4] All performed their duties in a satisfactory manner and received promotions and good job ratings. (JA 38).

Like the Melo plaintiffs, the Gurley plaintiffs were summarily discharged by Ms. Hafer shortly after she was inaugurated. (JA 39). The Gurley plaintiffs were fired because of their political association with and support for Mr. Bailey, the incumbent whom Ms. Hafer defeated in the November 1988 election for Auditor General. (JA 46). The Gurley plaintiffs were given no reason for their discharge, were not discharged because of unsatisfactory job performance and their discharge was in violation of the Policy and Procedures Manual of the Office of the Auditor General. (JA 39-41).

The Commonwealth of Pennsylvania was not named as a defendant in any of the Melo or Gurley Complaints. (JA 7, 26,

3. Hafer's motivation was twofold. First, the Melo respondents were all Democrats. Second, Hafer had made a campaign promise to fire them and she desired to fulfill that campaign promise and achieve maximum political publicity. (JA 12-13). Hafer ran for governor (unsuccessfully) in the November 1990 election.

4. None of the Gurley respondents were union employees.

33, 37). The caption of each Complaint names as a defendant "Barbara Hafer" but does not identify her as an officer of the Commonwealth. The Commonwealth did not receive notice of the suits nor was the Commonwealth given an opportunity to respond. (AA 44-49). The Complaints do not seek any monetary damages from the Commonwealth of Pennsylvania. None of the Complaints allege that the Commonwealth was the moving force behind the deprivation of respondents' civil rights or that the Commonwealth's policy or custom played a part in the civil rights violations. To the contrary, the Complaints allege that Hafer's actions were in violation of the collective bargaining agreement (for union employees) and the Policy and Procedures Manual (for non-union employees).

In her Answers to the Complaints, Hafer asserted the affirmative defense of qualified immunity. (JA 24, 32).

Petitioner's Statement of the Case at Page 5, Footnote 6, refers to arbitration hearings conducted on grievances filed by seven union Melo respondents. The arbitrators overruled Hafer, and ordered all seven respondents reinstated. The arbitrators found that Hafer exceeded her authority because the Melo respondents were truly innocent of any misconduct and Hafer could not fire them without "cause".[5] The Arbitrators' Awards were affirmed by the Commonwealth Court of Pennsylvania.

The District Court dismissed both the Melo and Gurley Complaints on the theory that Hafer was acting in her official capacity when she fired respondents and that state officials acting in their official capacity are not "persons" within the meaning of 42 U.S.C.A. §1983. The Court of Appeals reversed holding that the claims against Hafer for monetary damages

5. Arbitrator Anderson found that:
"Even under a speculative test of reasonableness the employee should at least have been given notice of the charges against them and an opportunity to respond. However, the record shows this was not done by the new administration. The conduct of the Auditor General (Hafer) in summarily dismissing the employee without any investigation by her or her staff, as promised in her campaign, is totally inexcusable under any test of reasonableness and certainly not under the contract test of just cause." See Page 18 of Arbitration Award of March 8, 1990 (DiCosimo and Jurik).

were claims made against her in her personal capacity and therefore cognizable under §1983. The Court of Appeals found that the Complaints did indicate that all respondents were proceeding against Hafer for monetary damages in her personal capacity and, in any event, respondents so stated to the District Court in opposing Hafer's Motion. (PA 16-17). Respondents' Brief filed in the District Court states at Page 23:

> "The mere fact that Barbara Hafer is the official who has the power to fire people in her department does not mean that every firing is an act of official policy which permits Ms. Hafer to cover herself in the cloak of the Eleventh Amendment. More importantly, *Scheuer* clearly holds that the nature of the allegations made in the Complaint determine whether the plaintiff is pursuing a personal capacity or official capacity cause of action. If plaintiff was pursuing an official capacity cause of action, it would be necessary, as stated in *Kentucky vs. Graham,* to allege that the entity was the moving force and that the act which violated his civil rights was a policy or custom of the entity. No such allegations appear in the Complaint. Plaintiffs have not alleged that the Commonwealth was a moving force in the violation of their civil rights or that what Ms. Hafer did was policy or custom. ***Plaintiffs are pursuing a personal capacity suit for monetary damages and it is plaintiffs' contentions and plaintiffs' allegations that control.*** If the plaintiffs wish to pursue the monetary damage claim against Ms. Hafer on a personal capacity basis only and draft the Complaint in support of that position, the defendant cannot insert into the Complaint official capacity allegations which are simply not there (and which are also untrue)." (Emphasis supplied).

SUMMARY OF ARGUMENT

The Eleventh Amendment provides no shield for a state official confronted by a claim that he personally has deprived another of federal rights under color of state law. *Scheuer vs. Rhoads,* 416 U.S. 232 (1974). As long as the state official is the actual tortfeasor and as long as monetary damages are sought

from the official's private purse and not the public treasury, the state is not a party to the action and the action is not barred by the Eleventh Amendment.

The doctrine of limited qualified immunity prevents civil rights suits from becoming an unwarranted intrusion upon the executive branch of government. *Scheuer; Harlow vs. Fitzgerald,* 457 U.S. 800 (1982). In civil rights actions against both federal and state defendants, government officials performing discretionary functions will be immune from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

The Melo and Gurley respondents have pleaded a "personal capacity" suit under *Kentucky vs. Graham,* 473 U.S. 159 (1985). Respondents do not seek any money from the Commonwealth. They do not allege that the Commonwealth was the moving force behind the deprivation of their civil rights or that the Commonwealth's policy or custom played a part in such violation. To the contrary, they allege that petitioner exceeded her authority under the collective bargaining agreement and the Policy and Procedures Manual. The Commonwealth did not receive notice of the law suits nor was the Commonwealth given an opportunity to respond. It was Hafer who violated the civil rights of the Melo and Gurley respondents and it is from Hafer's private purse that monetary damages were sought.

As a general rule, the plaintiff determines whether the law suit will be a personal or official capacity law suit. It is the plaintiff who pleads whether the government entity was the "moving force" behind the deprivation. It is the plaintiff who chooses whether to pursue the public treasury or a private purse. Once the plaintiff makes his choice known, plaintiff's decision controls. *Brandon vs. Holt,* 469 U.S. 464 (1985). Respondents did not allege in their Complaints the sine qua non of an official capacity law suit – that the entity was the moving force behind the deprivation – and respondents never sought damages from the Commonwealth. Further, in response to petitioners' Motion for Summary Judgment, respondents advised the District Court that they were pursuing a personal capacity law suit.

If a civil rights action is not barred by the Eleventh Amendment, then a state official sued in his or her personal capacity is a "person" within the meaning of §1983. *Howlett vs. Rose,* 110 S.Ct. 2430 (1990). It is only when an individual has Eleventh Amendment immunity that he or she is not a "person" under §1983. Hafer does not have Eleventh Amendment immunity and therefore she is a "person" under §1983.

ARGUMENT

I. RESPONDENTS' CLAIMS AGAINST PETITIONER ARE NOT BARRED BY THE ELEVENTH AMENDMENT.

The Auditor General of Pennsylvania is an elected office which serves as a financial watchdog for receipts and disbursements from the state treasury. However, the individuals who work within the Department of the Auditor General are employed by the Commonwealth of Pennsylvania. Some are union members and the terms of their employment are governed by a collective bargaining agreement. Non-union employees are subject to the Department's Policy and Procedures Manual which provides the terms under which an employee may be disciplined or dismissed. It was established Commonwealth policy that both union and non-union employees within the Auditor General's Department could not be fired without just cause. (JA 191-193).

Respondents were fired without just cause and for purely political reasons. The Gurley respondents were all supporters of the incumbent Auditor General, Donald Bailey, whom Hafer defeated in the 1988 election, and were fired for that reason. The Melo respondents were fired because they were Democrats and because Hafer had made a campaign promise to fire them. Hafer fulfilled that promise in such a way as to reap the maximum political publicity. Political publicity was important to Hafer; she was the (unsuccessful) Republican candidate for governor in 1990.

In *Scheuer vs. Rhoads,* 416 U.S. 232 (1974) the Court decided that a high state official (the governor of Ohio) could be sued personally for damages by victims of a civil rights tort where the official himself committed the tort. In *Scheuer,* Governor Rhoads was accused of willfully and wantonly causing an unnecessary deployment of the Ohio National Guard on the Kent State campus and ordering the guard members to perform illegal actions which resulted in the deaths of several students. This conduct was obviously taken in Governor Rhoads' official capacity because he would be the commander-in-chief of the

Ohio National Guard. Similarly, Governor Rhoads would have substantial discretion in deployment of the Ohio National Guard.

The issue in *Scheuer* was whether the Eleventh Amendment barred a civil rights claim against Governor Rhoads for monetary damages to be collected from him personally. The Court allowed the claim and held that where Governor Rhoads personally caused a deprivation of civil rights and where damages were sought from Governor Rhoads' private purse, the State of Ohio was not a party to the litigation and the Eleventh Amendment did not bar the claim. The Court stated:

> "It is well established that the (Eleventh) Amendment bars suits not only against the State when it is the named party but also when it is the party in fact . . . . However, since *Ex parte Young* . . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law. *Ex parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity for responsibility to the supreme authority of the United States.' " (Page 237) (Emphasis not supplied)

The Court in *Scheuer* then went on to explain that where the plaintiff is seeking damages from the public treasury, the Eleventh Amendment is a complete bar to a §1983 claim. The Court stated:

> "While it is clear that the doctrine of *Ex parte Young* is of no aid to a plaintiff seeking damages from the public treasury, *Edelman vs. Jordan*, supra . . . ., damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office . . . . In some situations a damage remedy can

> be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." (Page 238)

The essence of *Scheuer* is that a state official who commits a civil rights tort may be called upon to respond in damages to his victim as long as the award is not paid out of the public treasury. *Scheuer* is authority for respondents' claims. Hafer committed a civil rights tort and respondents, the victims, do not seek compensation from the public treasury.

Scheuer also addressed the concern that civil rights suits against high state officials would unreasonably interfere with state government. The Court established a qualified immunity and rejected the concept that a high executive official should have an absolute immunity. The Court stated:

> "Under the criteria developed by precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have 'the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.' " (Page 248)

The doctrine of qualified immunity for high officials in the executive branch was ultimately defined in *Harlow vs. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court again rejected a claim for absolute immunity and stated:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Page 817)

Although *Harlow* involved a civil rights claim against federal officials, the Court stated that the test for qualified immunity would be the same as under §1983 and cited *Scheuer* as the source decision for qualified immunity of executive officials. (Page 807-9). *Harlow* also re-stated the justification for rejection of absolute immunity and the importance of damages actions as a vehicle to vindicate federal rights:

"The greater power of high officials . . . . affords a greater potential for a regime of lawless conduct . . . . Damages actions against high officials were therefore 'an important means of vindicating constitutional guarantees.' " (Page 808)

In *Scheuer*, the Court drew the distinction between a personal capacity law suit and an official capacity law suit. In *Kentucky vs. Graham*, 473 U.S. 159 (1990), the Court further defined this distinction and stated:

"Proper application of this principle in damages actions against public officials requires careful adherence to the distinction between personal and official capacity action suits. Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal and official capacity actions." (Page 165)

The Court then set forth the following criteria:

1. A personal capacity suit seeks to impose personal liability upon a government official for actions taken by the government official under color of state law.

2. An official capacity suit is generally only another way of pleading an action against the governmental entity of which the official is an agent.

3. In an official capacity law suit, the government entity is the real party in interest. An award of damages in such a suit can be collected from the government entity only. An award of damages in a personal capacity law suit can be collected only from the official's personal assets.

4. To establish liability in a personal capacity law suit, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.

5. In an official capacity law suit, the plaintiff must plead and prove that the entity was the moving force

behind the deprivation and that the entity's policy or custom played a role in the violation of federal law.

6. In a personal capacity law suit, the official may assert the personal immunity defenses such as qualified immunity where applicable and absolute immunity where applicable. In an official capacity law suit, these defenses are unavailable.

7. In an official capacity law suit, the only immunities which can be claimed as a defense are such forms of sovereign immunity as the entity, qua entity, may possess such as the Eleventh Amendment.

The above criteria were established in 1985. When the instant law suits were filed in 1989, they were governed by *Graham*. None of the Complaints filed by the Melo or Gurley respondents alleged that the Commonwealth was a moving force behind the deprivation of their civil rights or that the Commonwealth's policy or custom played a part in the violation of federal law. To the contrary, all respondents alleged that Hafer violated the Commonwealth's policy or custom with respect to firing for cause and that Hafer exceeded her authority under both the collective bargaining agreement and the Policy and Procedures Manual.

Respondents did not name the Commonwealth as a defendant nor did they sue Hafer in her official capacity as Auditor General of Pennsylvania. No damages were sought from the Commonwealth and the Commonwealth was not served with a copy of Complaint. All of the Complaints identified Hafer personally as the civil rights tortfeasor and it was Hafer's personal conduct that was alleged to have caused the deprivation of respondents' civil rights. Hafer obviously understood that she was being sued in her personal capacity because she pleaded qualified immunity as an affirmative defense.

The Melo Complaints do not use the words "personal capacity". However, they plead sufficient facts to establish Hafer's personal liability for a civil rights tort and do not plead the facts necessary under *Graham* to establish the liability of the Commonwealth. In addition, the Melo respondents seek only

monetary damages and therefore would be completely out of court under the Eleventh Amendment if they were pursuing Hafer in her official capacity. *Edelman vs. Jordan,* 415 U.S. 651 (1974). It would not be reasonable to interpret a pleading so as to render it ineffective on its face. Under the law as it existed at the time the Melo Complaints were filed, the Melo respondents pleaded only a personal capacity law suit.

With respect to the Gurley respondents, the Complaints filed in Gurley and Best are analogous to the Melo Complaint. The Complaints filed by Brennan, et al. do identify personal capacity versus official capacity claims and make it clear that all monetary damage claims are sought against Hafer in her personal capacity while claims for prospective relief (reinstatement) are made against Hafer in her official capacity as the titular head of the Department of the Auditor General.

In *Brandon vs. Holt,* 469 U.S. 464 (1985), the Court was presented with an ambiguous pleading with regard to whether it asserted a personal or official capacity §1983 claim against a municipal official. The Court resolved the ambiguity by reference to post-pleading conduct. The Court stated:

> "The course of proceedings after *Monell* was decided did, however, make it abundantly clear that the action against Chapman was in his official capacity and only in that capacity. Thus, in petitioners' response to a defense Motion for Summary Judgment, petitioners' counsel stated:
>
> > 'Chapman is sued in his official capacity as Director of Police Services, City of Memphis, Tennessee. Official capacity suits generally represent an action against an entity of which an officer is an agent . . . . *Monell vs. New York Department of Social Services,* . . .' " (Page 469-470)

Because the course of proceedings made is clear that plaintiff was pursuing an official capacity law suit, the Court went on to state:

> "Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the district court's findings of fact. Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed; this is because we regard the record as plainly identifying petitioners' claim for damages as one that is asserted against the office of the 'Director of Police, City of Memphis' rather than against the particular individual who occupied that office when the claim arose. Petitioners are claiming a right to recover damages from the City of Memphis." (Page 471)

Respondents' post-pleading conduct removes any possible ambiguity that they were proceeding against Hafer in her personal capacity. Respondents advised the District Court, in response to Hafer's Motion for Summary Judgment, that they were proceeding against Hafer in her personal capacity. Respondents' Brief in Opposition to Hafer' Motion states:

> "Plaintiffs are pursuing a personal capacity suit for monetary damages and it is plaintiffs' contentions and plaintiffs' allegations that control." (Page 23 of Brief)

The Circuit Court understood that Hafer was being sued in her personal capacity and further found that respondents had made it abundantly clear to the District Court that they were proceeding in a personal capacity law suit. The Circuit Court stated:

> "As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the Complaints only listed 'Barbara Hafer' and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her personal capacity because she raised the defense of qualified immunity throughout the course of the proceedings, a defense available only for government officials when they are sued in their personal, and not their official, capacity . . . . Moreover, once plaintiffs explained to the District Court

that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about the issue." (PA 16)

Respondents' pleadings and post-pleading conduct presented personal capacity civil rights claims for damages against Hafer under the tests established in Scheuer, Graham and Brandon. Therefore, respondents' claims are not barred by the Eleventh Amendment.

II. IF THE ELEVENTH AMENDMENT DOES NOT BAR RESPONDENTS' CLAIMS, HAFER IS A PERSON WITHIN THE MEANING OF 42 U.S.C. §1983.

In *Howlett vs. Rose,* 110 S.Ct. 2430 (1990), the Court in a unanimous opinion interpreted the meaning of its decision in *Will vs. Michigan,* 491 U.S. 58 (1989), 109 S.Ct. 2304. The Court stated:

> "As we held last Term in *Will vs. Michigan Department of State Police* . . . . an entity with Eleventh Amendment immunity is not a 'person' within the meaning of §1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will. Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under §1983 in either federal court or state court." (Page 2437)

Therefore, the essence of *Will* is whether the defendant is deemed to be the state or an arm of the state. If so, such defendant would enjoy Eleventh Amendment immunity from a §1983 action and cannot be sued in either federal or state court.

When sued in her personal capacity for civil rights torts which she personally committed, Hafer is neither the state nor an arm of the state. She is not an entity which enjoys Eleventh Amendment immunity and therefore she remains a "person" within the plain meaning of §1983.

Hafer seeks to avoid liability for the violation of respondents' civil rights which she personally committed by asserting that she was "acting" in her official capacity when she terminated the employment of all respondents without cause and for purely political reasons. However, the term "acting in official capacity" is really no different than "acting under color of state law". The fact that the defendant is a state official and acts in that capacity is what gives the conduct the "color" of state law.

> "Indeed, as Justice Frankfurter once noted during the seventy years which followed the enactment of the original Civil Rights Act of 1866, every case before the Supreme Court in which the 'color of state law' provisions were invoked 'involved action taken either in strict pursuance of some specific command of state law or within the scope of executive discretion in the administration of state laws'." *Farid vs. Harold J. Smith, Superintendent of Attica Correctional Facility,* 850 F.2d 917, 921 (2nd Cir. 1988).

Governor Rhoads was obviously acting in his official capacity when he deployed the National Guard. Nevertheless, he would have personal liability for a civil rights tort which he personally committed and where the award would not be paid out of the state treasury. Similarly, in *Graham,* the Commissioner of Kentucky State Police, Mr. Brandenburgh, the highest ranking law enforcement officer of Kentucky, would have been acting in his official capacity when he directed a raid which allegedly caused a violation of Mr. Graham's civil rights. Although Mr. Brandenburgh was acting in his official capacity at the time of the violation, he was sued in his personal capacity for a civil rights tort which he personally committed.

In addition, *Brandon,* holds that plaintiffs may choose whether to pursue a §1983 defendant personally or in an official capacity. Respondents have made their choice both by the nature of their pleadings and by specifically so stating to the District Court in response to Hafer's Motion for Summary Judgment.

Hafer seeks to draw a distinction between acts of state officials "under color of state law" which are outside the official's authority or which are not essential to the operation of state

government and acts of the same officials which are within the official's authority and necessary to the performance of state governmental functions. Hafer argues that the latter acts are immune from liability under §1983 and that civil rights victims are limited to redress for violations which occur outside the official's authority and which are not essential to the operation of state government.

In *Scheuer,* Governor Rhoads was acting within his authority when he deployed the National Guard. In addition, deployment of the National Guard would be conduct essential to the operation of state government. Nevertheless, he would have been held personally liable if he committed a civil rights tort.

In *Graham,* Mr. Brandenburgh was acting within his authority when he directed police activity at the Graham residence. Further, law enforcement is clearly essential to the operation of state government. Nevertheless, Mr. Brandenburgh had personal liability for the civil rights tort he committed upon the Graham family.

Where executive state officials are acting within their authority and performing functions necessary for state government, they are given a qualified immunity. *Scheuer; Harlow.* This immunity adequately protects state government from being disrupted by civil rights law suits. The reason given for the doctrine of qualified immunity was well stated in *Scheuer:*

> "The public interest requires decisions and action to enforce laws for the protection of the public . . . . 'It is not a tort for the government to govern.' " (Page 241)

It is only when state government officials transgress civil rights that are "clearly established statutory or constitutional rights of which a reasonable person would have known" that they incur liability.

Hafer seeks an absolute immunity. However, the law is well-established that high state executive officials are not entitled to absolute immunity. The Court stated in *Forrester vs. White,* 484 U.S. 219 (1988):

> "Among executive officials, the President of the United States is absolutely immune from damages liability arising from official acts... This immunity, however, is based on the President's 'unique position in the constitutional scheme,' . . . and it does not extend indiscriminately to the President's personal aides, . . . or to cabinet level officers. Nor are the highest executive officials in the States protected by absolute immunity under federal law. See *Scheuer v. Rhodes,* supra." (Page 225).

In *Forrester,* the Defendant was a State court judge who fired a probation officer because she was female. The Defendant argued that the conduct of judges was subject to absolute immunity. However, the court held that hiring and firing is an administrative function only to which qualified immunity applied. The court stated:

> "In the case before us, we think it clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester. Those acts—like many others involved in supervising court employees and overseeing the efficient operation of a court—may have been quite important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative. As Judge Posner pointed out below, a judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, *or indeed from any other executive branch official who is responsible for making such employment decisions.* Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under Section 1983." (Page 545). (Emphasis supplied.)

Hafer's conduct in firing respondents was administrative. Executive branch officials, like judicial officials, who make employment decisions have never received absolute immunity. In addition, *Forrester* is an example of a *Scheuer*-type personal capacity lawsuit where a state official was held personally liable

to his victim for a civil rights tort where the official was the tortfeasor and no damages were sought from the public treasury.

Hafer's contention that she was acting within her authority is not only irrelevant, it is factually incorrect. Hafer did exceed her official authority when she fired respondents. Both the union and non-union respondents could not be fired except for cause. Hafer has already been forced to re-hire the union respondents. Hafer abused her office and terminated respondents' employment for reasons that were beyond the scope of her authority and were personal to her, i.e., partisan politics.

Hafer hangs her hat on one sentence in the *Will* Opinion, to wit:

> "We hold that neither a state nor its officials acting in their official capacities are persons under §1983." (Page 71)

Hafer argues that this one sentence overrules *Scheuer, Graham* and *Brandon*. However, Hafer has taken the sentence out of context. The sentence is preceded by the following:

> "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon vs. Holt* . . . . As such, it is no different from a suit against the state itself. See e.g. *Kentucky vs. Graham*, . . . *Monell* . . . . We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device." (Page 71)

It is obvious from the above quotation that *Will* was not intended to overrule *Graham, Brandon* or *Scheuer*. Instead, the correct interpretation of *Will* was stated by a unanimous court in *Howlett* as follows:

> "As we held last Term in *Will vs. Michigan* . . . . an entity with Eleventh Amendment immunity is not a 'person' within the meaning of §1983. The anomaly identified by the State Supreme Court, and by the various state courts which it cited, that a State might be forced to entertain in its own courts suits from which it was immune in federal court, is thus fully met by our decision in *Will*. *Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under §1983 in either federal court or state court." (Page 2437)

The correct interpretation of *Will* is simply that an entity (or individual) with Eleventh Amendment immunity is not a "person" within the meaning of §1983.

It does not appear from the *Will* opinion that Will sued the person who actually violated his civil rights. Will sued the "Department of State Police" and the "Director of State Police in his Official Capacity". Will did not identify any person as the actual perpetrator of a civil rights tort and did not sue any state official in his or her personal capacity. Once Will identified his suit as an official capacity suit, it followed under *Graham* that Will was actually suing the State of Michigan. The majority in *Will* therefore reasoned that if the State of Michigan enjoyed Eleventh Amendment immunity in a §1983 action in federal court, it would be anomalous for Will to be allowed to pursue the same cause of action in state court, especially where the legislative history of §1983 indicated that Congress contemplated that the federal courts would be the primary forum for §1983 actions.

The doctrine that a high state official who commits a civil rights tort can be held personally accountable in damages to his victim has been well-established since 1974 in *Scheuer*. *Scheuer* was a unanimous decision of the eight justices who participated. *Scheuer* was cited with approval in *Graham* (Page 165) and *Graham* was also a unanimous decision. *Graham* also cited with approval *Brandon* (Pages 164, 166). *Brandon* was a 7-2 decision with one concurrence and one dissent.[6] The *Forrester* decision in 1988 followed *Scheuer* and there were no dissents.

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6. The dissent of Justice Rehnquist dealt largely with the issue of whether damages could be collected from a government entity where the caption identified the defendant as the police commissioner acting in his official capacity and not the government entity. This issue is not present in the instant case because damages are sought from Hafer and Hafer is a named defendant in the caption.

The doctrine of stare decisis is strongest when the Court confronts its previous constructions of legislation. As stated by Mr. Chief Justice Rehnquist in his dissent in *Monell v. New York City Dep't of Social Services,* 436 U.S. 658 (1978):

> "As this Court has repeatedly recognized . . . . *Edelman vs. Jordan,* 415 U.S. 651 . . . ., considerations of stare decisis are at their strongest when this court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this Court's settled construction of the law, but the Congress is at liberty to correct our mistakes of statutory construction, unlike our constitutional interpretations, whenever it sees fit . . . . Only the most compelling circumstances can justify this Court's abandonment of such firmly established statutory precedence." (Page 714-15)

Applying the doctrine of stare decisis to *Scheuer, Graham, Brandon* and *Forrester,* this Court should not depart from the well-established doctrine that a state official bears personal responsibility for his civil rights torts when sued in his personal capacity. The official is given ample protection by the doctrine of qualified immunity. Executive state officials are not entitled to absolute immunity, especially when performing the administrative function of hiring and firing.

CONCLUSION

The Circuit Court correctly held that Hafer was sued in her personal capacity for a civil rights tort which she herself committed and that no damages were sought from the state's public treasury. Therefore, Hafer does not enjoy Eleventh Amendment immunity and is a person under 42 U.S.C. §1983. The Circuit Court should be affirmed.

Respectfully submitted,

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